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March 21, 2005

By Hand Delivery

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

Re: Duke Energy Corporation v. Norfolk Southern Railway Company, STB Docket No. 42069; Duke Energy Corporation v. CSX Transportation, Inc., STB Docket No. 42070; Carolina Power & Light Co. v. Norfolk Southern Railway Company, STB Docket No. 42072 - 213591 - 213593 - 213594

Dear Secretary Williams:

Enclosed for filing on behalf of CSX Transportation, Inc. and Norfolk Southern Railway Company in the above-referenced proceedings are a signed original and ten (10) copies of Defendants' Joint Reply in Opposition to Complainants' Joint Motion to Compel Discovery Responses on Phasing. Additionally, this filing includes three (3) diskettes containing electronic versions of the Reply.

Please acknowledge receipt of this submission for filing by date-stamping the enclosed duplicate paper copy and returning it to our messenger. If you have any questions concerning this filing, please contact one of the undersigned. Thank you for your attention to this matter.

Sincerely,

G. Paul Moates
Terence M. Hynes
Paul A. Hemmersbaugh

Enclosures

ORAL ARGUMENT REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION Complainant, v. CSX TRANSPORTATION, INC. Defendant.	Docket No. 42070 -213591
DUKE ENERGY CORPORATION Complainant, v. NORFOLK SOUTHERN RAILWAY COMPANY Defendant.	Docket No. 42069 -213593
CAROLINA POWER & LIGHT COMPANY Complainant, v. NORFOLK SOUTHERN RAILWAY COMPANY Defendant.	Docket No. 42072 -213594

DEFENDANTS' JOINT REPLY IN OPPOSITION TO COMPLAINANTS' JOINT MOTION TO COMPEL DISCOVERY RESPONSES ON PHASING

Defendants CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NS") submit this Joint Reply in Opposition to Complainants' Joint Motion to Compel

Discovery Responses on Phasing ("Motion"). The Motion seeks to impose upon Defendants the burden and expense of compiling and producing a massive volume of data and information that simply is not relevant to matters properly at issue in a phasing proceeding. As Defendants demonstrate below, neither the issues Complainants' discovery purports to address nor the evidence that Complainants contend they would develop on the basis of that discovery, are relevant to the substantive standards that the Board must apply in determining whether phasing relief is appropriate in this case.

The *Coal Rate Guidelines* summarize the limitations on discovery in rate cases:

> [A] shipper seeking discovery must state with particularity the nature and substance of the charges it seeks to prove, as well as the basis for its belief in those charges. In other words, it must demonstrate a real, practical need for the information. The discovery requested must be reasonably tailored to the particular charges to be proved and reflect the least intrusive means of obtaining the information.

1 I.C.C. 2d 520, 548 (1985) (emphasis added). In these very cases, the Board emphasized that discovery "must be narrowly drawn, directed to a relevant issue, and not used for a general fishing expedition." Decision at 4, *Duke v. NS,* Doc. No. 42069; *Duke v. CSXT*, Doc. No. 42070 (July 26, 2002) (denying railroads' motions to compel discovery). As demonstrated below, Complainants are engaged in just such a fishing expedition, seeking broad, unprecedented, and burdensome discovery, supported only by vague, fleeting, and general references to the purposes for which they seek it. Much of the discovery Complainants seek has never been allowed in the broader context of a SAC proceeding – certainly there is no basis for allowing such unprecedented discovery in the much narrower context of a phasing proceeding, where the Board's SAC analysis has already shown the rates to be reasonable, and the only question is whether those rates may cause such significant economic dislocation that they must be phased in for the greater public good.

Moreover, much of the evidence that Complainants say they would develop from the materials that are the subject of their Motion could be prepared by using other documents that Defendants have agreed to produce (notwithstanding their irrelevance), as well as the detailed Carload Waybill Sample data that Complainants have already obtained from the Board. The Board should reject Complainants' attempt to interject a variety of irrelevant matters in this phasing proceeding, and deny the Motion in its entirety.

In light of the important issues raised by Complainants' Motion, and the fact that these issues arise in the Board's first case under the CMP phasing constraint, Defendants request that the Board schedule oral argument with respect to Complainants' Motion.

I. COMPLAINANTS' MOTION MISSTATES THE STANDARDS GOVERNING DISCOVERY IN RATE CASES, AND SEEKS INFORMATION THAT IS CUMULATIVE OF OTHER DISCOVERY DEFENDANTS HAVE ALREADY PROVIDED.

A. The Governing Standards

Complainants' Motion misstates Defendants' position with respect to the proper scope of discovery in this phasing proceeding. Specifically, Complainants attribute to Defendants the position that they "are exempt from any discovery on topics other than economic dislocation." Motion at 8. Defendants made no such assertion, and they do not advocate such a position.[1] Complainants may propound discovery requests with respect to any of the standards

[1] In their objections and responses to Duke's discovery requests, Defendants correctly stated that, under the standard established by the *Coal Rate Guidelines*, Complainants cannot obtain relief on the merits in a phasing proceeding unless they demonstrate that the challenged rates cause significant economic dislocation. *See, e.g.*, Motion Exhibit A at 4-8. NS' objections further stated that, instead of focusing on that essential threshold question, Duke was seeking discovery that was not relevant to any subject properly at issue in a phasing proceeding. *Id.* Neither NS nor CSXT took the position that economic dislocation was the only relevant topic in a phasing proceeding, nor that phasing discovery should be bifurcated. Compare *id.* with Motion at 7-8. The railroads fully acknowledge that Complainants may seek discovery that is relevant to the equitable factors that the *Guidelines* establish may be considered in determining the degree of phasing that would be appropriate in the event Complainants show with specificity that the rates

for phasing articulated by the ICC in Ex Parte 347 (Sub. No. 1), *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (Aug. 8, 1985) (*"Guidelines"*). However, as Complainants themselves acknowledge, in order to compel a response to a particular discovery request, Complainants must demonstrate that the request is "narrowly drawn to obtain information on a relevant issue" under those standards. Motion at 4. Complainants' Motion fails to make this necessary showing.

The fundamental flaw in Complainants' Motion is that it is based upon a patently erroneous statement of the substantive standards that the Board must apply in ruling on Complainants' requests for phasing relief. As Defendants have previously shown, in order to obtain phasing, the *Guidelines* require a shipper to demonstrate that: (1) implementation of the full rate would "cause significant economic dislocations," which, (2) "must be mitigated for the greater public good." *See* CSXT Responses/Objections to Complainants' First Set of Discovery Requests on Phasing (February 22, 2005) at 3-5; NS Responses/Objections to Complainants' First Set of Discovery Requests on Phasing (February 25, 2005) at 5; *see Guidelines,* 1 I.C.C.2d 520, 546-47. And, if the Complainant is able to show the rates cause such economic dislocation, the Board does not merely balance any "equity" the shipper can conjure up, but rather follows the *Guidelines* by considering only those equities affecting the public interest. Thus, the only discovery that can be had is that which is relevant to either economic dislocation or the equities affecting the public interest. By contrast, Complainants maintain that the *Guidelines* "do not impose any requirement of the nature advocated by the Railroads." Motion at 8. Rather, Complainants contend, the *Guidelines* "treat the Phasing Constraint as an inquiry that is to be

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may cause significant economic dislocation. Both railroads did make the point, however, that all of the objective evidence points toward one ineluctable conclusion: the challenged rates did not cause significant economic dislocation to Complainants or to their customers. Unless Complainants can make a powerful contrary showing, no phasing would be proper in this case.

based upon a balancing of the equities." *Id.* Pointing to various factors (*e.g.*, the short-term revenue needs of the railroad, the magnitude of the proposed rate increase, and the magnitude of past increases) mentioned in the *Guidelines*, Complainants (erroneously) allege that "the Commission gave no indication that they should not be considered absent a prerequisite finding of economic dislocation." *Id.* at 6.[2]

Complainants are wrong. While Complainants may seek **discovery** of information that is relevant to the specific equitable factors articulated in the *Guidelines* (at 547), the threshold requirement for obtaining phasing relief on the merits is a showing of significant economic dislocation caused by the challenged rates. The *Guidelines* established the substantive standard for obtaining phasing relief:

> We continue to believe that in some instances otherwise justified rate increases could cause significant economic dislocations which must be mitigated for the greater public good. **In those situations**, phasing may be an appropriate means of balancing the public need for a sound, healthy rail system with the public need for smooth, orderly economic transitions. However, the degree of phasing should be tailored to the equities of the situation at hand.
>
> We will only require phasing of a rate increase where the party seeking such relief demonstrates the need for it with specificity. In balancing the equities of the particular situation, we will consider such factors as the short-term revenue requirements of the railroads, the magnitude of the proposed increase, the magnitude of past increases, the impact of the rate increase on kilowatt-hour charges, the dependence of the utility on coal (as opposed to other fuels), the economic conditions in the final destination market (and the impact of the rate change on that market), the economic

[2] A phasing proceeding is not, as the Motion would have it, an amorphous balancing of whatever "equities" Complainants can think of, in order to determine whether rates that the Board has held reasonable under SAC are somehow – under some undisclosed and undefined standard – "unfair" or inequitable. Rather, the *Guidelines* establish specific equitable factors for the Board to consider, if the complainant first demonstrates significant economic dislocation caused by the challenged rates. Even if the *Guidelines* had not expressly listed the factors to be considered, the standardless, "anything goes" exercise Complainants apparently advocate would be arbitrary, capricious, and contrary to law.

> conditions in the coal supply area (and the impact of the rate increase on that region), and any supply contracts involved.

1 I.C.C.2d at 546-547 (emphases added).

As the highlighted language makes clear, *Guidelines* holds that phasing "may" be appropriate only "in those situations" where complainants show that a rate increase could cause "significant economic dislocation which must be mitigated for the greater public good." 1 I.C.C.2d at 546. The ICC stated unequivocally that phasing relief would be granted "only" where the shipper "demonstrates the need for it with specificity." *Id.* This language imposes a clear requirement upon a party seeking phasing to proffer specific evidence showing that the challenged rates have caused (or will cause) significant economic dislocation, and that such harm needs to be mitigated for the public good (and not simply for Complainants' private economic benefit). Thus, contrary to Complainants' argument, the *Guidelines* allow consideration of the other enumerated equities *if and only if* Complainants first demonstrate that the rates cause significant economic dislocation. *See id.*

Only after such a showing is made do the *Guidelines* instruct the Board to evaluate "the equities of the situation" in determining the "degree of phasing" that may be appropriate in a particular case. *Id.* at 546-47 (enumerating several specific factors that the Board may consider in performing this analysis). In applying these equitable factors to determine the appropriate "degree" of phasing, the Board's overall objective is to "balanc[e] the public need for a sound, healthy rail system with the public need for smooth, orderly economic transitions." *Id.* Complainants' contrary assertion, that the phasing constraint requires them to demonstrate nothing more than that phasing in the challenged rates would be "equitable," ignores the plain language of the *Guidelines* decision.

The Board's more recent pronouncements in the instant cases did not fundamentally alter the *Guidelines*. In the *Duke/NSR* proceeding, the Board described *Guidelines*' standard governing the phasing constraint in the following terms:

> [a]t times, a rate that may not have been proved unreasonable under a SAC test may be an increase that causes significant economic dislocation or have other inequitable consequences that may need to be mitigated for the greater public good. Therefore, the Guidelines include a 'phasing' constraint on railroad pricing. (Citation omitted). This constraint limits the introduction of otherwise permissible rate increases if they would lead to severe dislocation of economic resources."

Docket No. 42069, *Duke Energy Corp. v. Norfolk Southern Ry. Co.* (served November 6, 2003) at 39 (emphasis added). *See also* Docket No. 42070, *Duke Energy Corp. v. CSX Transportation, Inc.*, (served February 3, 2004) at 32. While the Board's recent decisions refer to "economic dislocation or . . . other inequitable consequences," those decisions confirm *Guidelines*' fundamental holding that phasing is appropriate only where permitting the full rate increase to go into effect would have consequences of a type that need to be mitigated for the public good.[3] Nowhere in its recent decisions did the Board suggest (as Complainants do) that a shipper may obtain phasing relief simply by showing that a phase-in of the challenged rates would, in some subjective and arbitrary sense, be "equitable."

Viewed in the context of the proper substantive standards for phasing relief, Complainants' Motion utterly fails to demonstrate that the discovery Complainants seek is both *relevant* to the issues in a phasing proceeding, and *narrowly tailored* to meet their need for such

[3] The Board's reference to "inequitable consequences" other than "significant economic dislocation" is not supported by the *Guidelines* decision. Defendants do not believe that the Board intended that reference to constitute a new standard for obtaining phasing relief. Any material change to the standard established by the *Guidelines* should be undertaken only in the context of a notice-and-comment rulemaking, not in an individual adjudicatory proceeding. However, should the Board hold otherwise, Defendants reserve their rights to challenge such a holding on judicial review.

information. Complainants' Motion – supported by little more than vague references to the purposes for which the contested discovery is sought – satisfies neither requirement.

Complainants cannot establish their right to the discovery they seek merely by reciting the general notion that the Board's rules should be "liberally construed." *See, e.g.*, Docket. No. 41989, *Potomac Electric Power Co. v. CSX Transp., Inc.*, (served May 27, 1997) at 2 ("The orderly administration of coal rate cases requires limits on what ordinarily would be broad discovery.") (citing *Guidelines*). As Complainants acknowledge, to be discoverable, the information sought must be "narrowly drawn" and relevant to the subject matter of the proceeding. *See* 49 C.F.R. § 1114.21(a); Decision at 4, Docket No. 42069, *Duke v. NS,*; Docket No. 42070, *Duke v. CSXT*, (July 26, 2002) (discovery "must be narrowly drawn, directed to a relevant issue, and not used for a general fishing expedition."), Motion at 3; *see also Guidelines,* 1 I.C.C. 2d 520, 548 (1985).

Complainants' assertion that evidence need not be *admissible* in order to be discoverable (Motion at 5) misses the point. Defendants' opposition to the Motion is premised upon the fact that the discovery at issue is not relevant to the subject matter of this phasing proceeding, not on whether the information sought would be admissible as an evidentiary matter. The fundamental requirement for allowable discovery is that it seek information "which is relevant to the subject matter" of a proceeding. 49 C.F.R. § 1114.21(a) (emphasis added). As this Reply demonstrates, neither the issues to which Complainants' discovery is addressed, nor the evidence that Complainants say they plan to develop on the basis of that discovery, are relevant to the proper standards for phasing relief. As numerous Board decisions confirm, the threshold requirement for all permissible discovery is that it seek evidence that is *relevant* to the subject matter of the proceeding. *See, e.g.*, Docket No. 33877, *Illinois Cent. R.R. Co – Construction & Operation*

Exemption, (May 25, 2001) (denying motion to compel discovery on ground that discovery sought was not relevant to the standard governing the proceeding); Docket No. 34060, *Midwest Generation, LLC – Exemption*, (March 20, 2002) (denying motion to compel discovery on the ground that discovery sought was irrelevant); Finance Docket No. 34335, *Keokuk Junction Ry. Co. – Feeder Line Acquisition*, (Nov. 13, 2003) (same).[4] Complainants' Motion fails to establish a nexus between the discovery they seek and the standards governing this phasing proceeding.

B. The Burdensome Discovery Complainants Seek in the Motion is Unnecessary, Because it is Cumulative of Discovery Defendants Have Agreed to Provide

Finally, even if the materials that Complainants seek to compel Defendants to produce were relevant – and they are not – their Motion should nevertheless be denied because the requested information is largely cumulative of information that Defendants have voluntarily agreed to provide, or that Complainants have obtained from other sources. The Board routinely denies motions to compel production of information where the party seeking that information already has obtained information sufficient to make the analysis. *See, e.g.*, Docket No. 42071, *Otter Tail Power Co. v. BNSF*, (Nov. 15, 2002) (denying railroad's motion to compel production of documents regarding circumstances under which complainant would purchase power, because complainant had produced documents sufficient to allow railroad to determine the effect of future power purchases on complainant's demand for coal); Docket Nos. 42069, 42070, *Duke Energy v. Norfolk Southern, Duke Energy v. CSXT,* (served July 26, 2002) at 8 (denying carriers' motions to compel Duke to produce documents on the ground that carriers already had access to

[4] *See also* Finance Docket No. 34000, *Canadian Nat'l Ry. Co. – Control – Wisc. Cent. Transp. Corp.*, (June 21, 2001) (denying motion to compel discovery because information sought "does not appear to be relevant to any matter in dispute in this case"); ICC Docket No. 40411, *Farmland Indus., Inc. v. Gulf Cent. Pipeline Co.*, (July 30, 1993); ICC Docket No. 38676, *Changes in Routing Provisions – Himont*, (June 1, 1990) (denying motion to compel discovery as "beyond the scope of issues in this proceeding"); ICC Docket No. MC-C-30130, *Sunwise Corp. v. RTC Transp., Inc.*, (Feb. 2, 1989).

the same type of information sought in their motion); Docket No. 41989, *Pepco v. CSXT,* (served May 14, 1997) (denying complainant motion to compel production of railroads' internal cost information on ground that complainant had already obtained URCS costs and other cost data in discovery).[5]

II. COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THEY ARE ENTITLED TO THE DISCOVERY SOUGHT BY THEIR MOTION TO COMPEL.

A. Profitability Studies/Benchmarks

Several of Complainants' discovery requests seek information described in their Motion as "Profitability Studies/Benchmarks" regarding Defendants' coal traffic. Motion at 11.[6] Complainants' Motion to compel production of those materials should be denied, for several reasons.

First, the stated purpose for which Complainants seek this information – "to evaluate the magnitude of the rate increases imposed on Duke and CP&L in the context of the profit margins under such rates as compared to the profit margins on the Railroads' other coal movements"

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[5] Federal courts also generally deny requests for discovery that are cumulative of information that the requesting party has already obtained. *See, e.g., Bayer AB v. Betachem,* 173 F.R.D. 188, 191-92 (3rd Cir. 1999); *Novartis Pharm Corp. v. Abbott Labs*, 203 F.R.D. 159, 164 (D. Del. 2001); *Insituform Technologies, Inc. v. Cat Constr.*, 914 F. Supp. 286, 287 (N.D. Ill. 1996).

[6] Many of the discovery requests that Complainants list in this category are no longer in dispute, and the Board need not consider them. Defendants have advised Complainants that they have no information responsive to Interrogatory Nos. 3 and 6 and corresponding Document Requests Nos. 16 and 19. Defendants have likewise advised Complainants that they do not have information directly responsive to Interrogatory No. 4 or to Document Request No.17, but have agreed to produce certain information that they have used to develop and establish coal transportation rates. Complainants accepted this response in the parties "meet-and-confer" discussions. Defendants have also advised Complainants that they have no documents responsive to Document. Request No. 7, and that Defendants will produce documents responsive to Document Request No. 10. Defendants have agreed to produce annual summaries of "fines, charges, or levies" paid from 2001 to the present in satisfaction of Interrogatory No. 5 and Document Request No. 18. Thus, the only discovery requests that remain at issue in this category are Interrogatory Nos. 1 and 2, and Document Request Nos. 9, 14, and 15.

(Motion at 11) -- is simply not relevant to this phasing proceeding. Defendants' "profit margins" on other customers' traffic (much less the "profit margins" on Complainants' traffic) have no probative value with respect to the issue of whether the challenged rate increases have caused significant economic dislocation, or any of the equitable considerations the Board may consider in determining the "degree" of phasing that might be appropriate upon a showing that such effects have occurred. *See Guidelines,* 1 I.C.C.2d at 546-47. Such a comparison of Defendants' rate levels and profit margins on various classes of traffic might be relevant, if at all, only under the *Guidelines*' "management efficiency" constraint. *See Potomac Electric Power Co. v. ICC*, 744 F.2d 185, 189-190 (D.C. Cir. 1984). Complainants have never invoked the management efficiency constraint in these proceedings, and it is far too late to do so now.

Second, to the extent Complainants seek forced discovery of information derived from Defendants' internal management costing data, models, or analyses, there is neither reason nor precedent for requiring production of such sensitive internal business information. Complainants already have access to the relevant URCS cost data, which are developed and reported specifically for use in rate cases and other regulatory proceedings. As the Board has expressly found, the railroads' internal cost systems are neither consistent nor compatible with the manner in which costs are calculated for purposes of rate reasonableness cases. *See* Docket No. 41898, *Pepco* (May 14, 1997) at 1-2.

The Board has consistently declined to require railroads to produce internal management cost system data in a rate case. *See, e.g.*, Docket No. 42038, *Minnesota Power v. Duluth, Missabe & Iron Range Railway Co.*, (served July 8, 1999) (denying complainant's motion to compel production of internal management cost system); Docket No. 41185, *Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Railway Co.*, (July 29, 1997) (same); Docket

No. 41989, *Pepco* v. *CSXT*, (May 14, 1997). Contrary to Complainants' assertions, there is even less justification to require production of internal management costs in a phasing proceeding than there might be in a SAC case (in which the costs incurred by a SARR are at issue).[7] Nothing in the *Guidelines* or in the Board's decisions in these cases suggests that comparison of profit margins on "issue" traffic versus "non-issue" traffic has any relevance whatsoever to the phasing inquiry.

In sum, the profitability data that Complainants seek to compel Defendants to produce is not relevant to any matter properly at issue in a proceeding under the phasing constraint. Complainants Motion offers no justification for the Board to depart from its longstanding practice of refusing to require the production of sensitive internal management cost data, models and analyses.

B. Revenue/Traffic Data and Masking Factors

Complainants' Document Request Nos. 1 and 2 asked Defendants to produce a massive volume of shipment-specific traffic, revenue and car movement data for all of the carriers' coal traffic that moved during the years 2002, 2003, 2004 and 2005 (to date). Defendants objected to those Requests on the grounds that the requested data are not relevant to any issue properly before the Board in this phasing proceeding. Moreover, Defendants could develop and produce

[7] Complainants' assertion that "the way the Railroads evaluate the profitability of their rail rates for business decision-making purposes is highly relevant to the evaluation of the equities of imposing the challenged rate increases at one time versus phasing them over some reasonable period" (Motion at 12) is incorrect. As Defendants demonstrate above, the *Guidelines* do not sanction an award of phasing relief on the basis of whatever "equities" a shipper may conjure, absent a specific showing that the challenged rates have had adverse consequences that need to be mitigated for the public good. Moreover, neither Defendants' subjective assessment of the relative profitability of different customers' traffic, or their motives in pricing such traffic differentially, are relevant to the Board's analysis in a phasing case.

those data only through a burdensome, expensive and time-consuming process.[8] For example, CSXT's response to Duke's request for similar traffic data for the years 1999 – 2001 earlier in these proceedings required it to extract over 400 *million* car movement records that filled more than 350 tape cartridges. CSXT spent well over $100,000 on computer costs, in addition to salaries and overtime pay for employees who worked in special around-the-clock shifts, in responding to Duke's request. *See* Reply Evidence and Argument of CSXT, filed September 20, 2002, Appendix A. Complying with Complainants' Request Nos. 1 and 2 would impose a similar burden on Defendants.

Defendants should not be compelled to produce the massive volume of movement-specific traffic, revenue and car movement data requested by Complainants because neither that data, nor the evidence that Complainants claim they would develop from that data, are relevant to the standards that the Board must apply in this phasing proceeding. Complainants assert that they would use the data to develop evidence regarding Defendants' "pricing practices" and, in particular, "the size of the increases in relation to increases on other traffic, and in particular coal traffic." Motion at 6, 14. *See* Appeal of Denial of Request for Waybill Information of Complainants, filed February 14, 2005. Such comparisons have no relevance to the standards governing requests for phasing relief.

The *Guidelines* indicate the Board may consider "the short-term revenue requirements of the railroads," "the magnitude of the proposed increase" and "the magnitude of past increases" in determining the "degree" of phasing, once the need for phasing has been established. However, the *Guidelines* do not mention comparisons between the challenged rates and rates

[8] *See* CSXT Responses/Objections to Complainants' First Set of Discovery Requests on Phasing, February 22, 2005 at 12-14; NS Responses/Objections to Complainants' First Set of Discovery Requests on Phasing, February 25, 2005 at 11-12.

paid by other shippers as a factor relevant to the "degree" of phasing – much less to the question whether phasing relief should be granted at all. This is not surprising. The failed policy of regulating rail rates to achieve "equalization" among shippers was abandoned by this agency decades ago. "Congress, in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L No. 94-210, 90 Stat. 35, and in subsequent legislation, effectively steered the ICC (and now the Board) away from the pre-1976 practice of regulating so as to equalize rates." Docket No. 42077, *Arizona Public Service Co. v. BNSF*, (decision served October 14, 2003) at 4. *See also Southwestern Millers' League v. Atchison, Topeka & Santa Fe Ry. Co.*, 364 I.C.C. 724, 730 (1981). As the ICC observed in 1983:

> "To the extent that the Commission formerly attempted to achieve comparability on rates charged for different movements of a commodity over a broad area, a rigid and uneconomic rate structure resulted which unduly inhibited the carriers' pricing flexibility and handicapped them in adapting to changing competitive environments. The thrust of regulation today has moved away from this focus on rate comparability and toward freedom for individual carrier pricing initiatives to maximize revenues in competitive markets."

Ex Parte No. 346 (Sub-No. 8), *Exemption From Regulation – Boxcar Traffic*, 367 I.C.C. 425, 442-443 (1983) ("*Boxcar Exemption*") (emphasis added). In particular, both Congress and the ICC contemplated that the introduction of contract rates would result in disparities between the rates paid by shippers: "[T]o the extent that carriers and shippers resort to contracts, carriers may lawfully discriminate with virtually complete freedom." *Boxcar Exemption* at 443 (emphasis added).

Any contention that the challenged rates should be phased in simply because those rates may be higher than rates paid by any other coal shipper would fly in the face of the principles of differential pricing upon which the Board's current ratemaking policies are founded. Likewise, any phasing order predicated on such rate comparisons "would be directly contrary to

congressional policy." Ex Parte No. 282 (Sub-No. 5), *Rulemaking Concerning Traffic Protective Conditions*, 366 I.C.C. 112, 122 (1982). Moreover, requiring a railroad to phase in an otherwise reasonable tariff rate increase on account of a perceived disparity between that tariff increase and the contract rates paid by other customers would create a strong disincentive to contract ratemaking, a practice which Congress explicitly sought to encourage in the Staggers Act. Accordingly, the "rate comparisons" that Complainants propose to develop from Defendants' traffic and revenue data are not relevant to the standards governing phasing relief.

Moreover, even assuming that such rate comparisons were relevant to phasing – and they are not – Complainants' Motion fails to demonstrate that the detailed, movement-specific traffic and revenue data that they seek to compel Defendants to produce is relevant to, or necessary to perform, such analyses. In response to Complainants' Request No. 3, Defendants have indicated their willingness to grant Complainants' outside counsel and consultants access to all coal transportation contracts and common carrier tariffs entered into during the period January 1, 2001 through the present.[9] Those materials provide detailed information – including customer names, traffic origins and destinations, volume commitments, rates and ancillary charges, and service terms -- for coal traffic handled by Defendants during the 2001 – 2005 period. With those contracts and tariffs, Complainants will be able to compare the rates and service terms under which their coal traffic moved (both before and after the challenged rates went into effect) with the rates and service terms applicable to Defendants' other coal shippers. Complainants' Motion does not explain why these materials – which disclose Defendants' entire pricing structure for coal traffic – are not sufficient to enable them to prepare whatever "rate

[9] Defendants' commitment to produce coal transportation contracts was made subject to the Board's issuance of an order requiring such disclosure, and to compliance with the terms of the Protective Order. *See* Defendants' Replies to Complainants' First Motion(s) to Compel Production of Documents in Response to Phasing Requests, filed March 10, 2005.

comparison" evidence Complainants desire to submit. Nor have Complainants proffered any persuasive reason for compelling Defendants to produce not only the "price list" for their coal traffic, but also shipment details for every individual car that moved under those pricing arrangements over a multi-year period.

In any event, the STB's Office of Economics has granted Complainants' request for access to all fields from the 2001-2003 Carload Waybill Samples for both CSXT and NS. *See* Letter dated February 15, 2005 from Leland L. Gardner to C. Michael Loftus. As a result of that approval, Complainants now have access to carload-specific information relating to both coal and non-coal traffic handled by Defendants during the years 2001, 2002 and 2003. Because Complainants have information adequate for their stated purpose (which is not relevant to a phasing proceeding in any event), there is no sound basis for compelling Defendants to produce cumulative and unnecessary additional data for the same purpose. *See, e.g.*, Docket No. 42071, *Otter Tail Power Co. v. BNSF,* (Nov. 15, 2002); Docket Nos. 42069, 42070, *Duke Energy v. Norfolk Southern, Duke Energy v. CSXT* (served July 26, 2002) at 8.

Acknowledging the burden that production of the data sought by Request Nos. 1 and 2 would impose upon Defendants, Complainants offer a "compromise" that they claim would "greatly lift any burden that would be associated with the production of the computerized traffic and revenue data." Motion at 13. Specifically, Complainants propose that Defendants be compelled to produce additional movement-specific data for the year 2004, along with the "masking factors" needed to identify the actual revenues earned on coal shipments contained in the 2001 -- 2003 Carload Waybill Sample data that Complainants have obtained from the Board. Complainants' "compromise" solution should be rejected, for several reasons.

First, as shown above, the movement-specific rate comparisons that Complainants propose to develop from the Carload Waybill Sample are not relevant to the phasing issue.

Second, the Acting Director of the Office of Economics has already rejected a request by Complainants' to obtain access to the highly confidential and commercially sensitive "unmasked" waybill revenues. *See* letter dated February 4, 2005 from Acting Director to Complainants' Counsel ("*Director's Decision*"). The *Director's Decision* confirmed what has always been the case – that no one (other than the Board and its staff) may have access to the revenue masking factors used in compiling the Costed Waybill Sample. Indeed, the Board's "long standing policy is that the unmasked revenues and the specific masking factors . . . are highly confidential, for internal Board use only, and not to be released to waybill users." *Director's Decision* at 1. The Board has consistently adhered to this policy, and has never authorized the release of unmasked revenue data to a shipper. See Letter dated February 1, 2005 from Terence M. Hynes to Dr. William F. Huneke at 1. Complainants' Motion offers no persuasive reason for the Board to depart from its longstanding (and well reasoned) policy by compelling Defendants to disclose their revenue masking factors in response to a discovery request.

Third, Complainants' assertion that Defendants' objection to producing their revenue masking factors is "disingenuous" because Defendants "have already produced highly sensitive revenue and traffic data in these proceedings" (Motion at 17) is wrong. Defendants produced traffic and revenue data at the outset of these proceedings because that data was clearly relevant to Complainants' selection of a traffic group for its SARR. By contrast, Complainants have failed to demonstrate that such movement-specific data has any relevance whatsoever to the standards that the Board must apply in considering Complainants' request for phasing relief.

Moreover, Complainants' suggestion that the confidentiality of the masking factors could be adequately protected by producing them pursuant to a protective order is beside the point:

> "These masking factors have never been made publicly available, not even under a protective order . . . . If movants had requested that we allow them access to the masking factors in our possession, we would have rejected their request, not for lack of a protective order, but because such masking factors have never been made available, and have never been intended to be made available, to any person not on our staff."

Finance Docket No. 33388, *CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co.—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corp.*("*Conrail Control*") Decision No. 42 (served Oct. 3, 1997) at 6 -7 (emphasis added).

Finally, Complainants' appeal for the Board to permit discovery of Defendants' revenue based upon the "unique" nature of this first phasing case before the Board (Motion at 17) is itself disingenuous. The nature of the inquiry contemplated by the *Guidelines* phasing constraint renders Complainants' request for any movement-specific revenue information (much less the highly sensitive masking factors used in compiling the Costed Waybill Sample) improper in this proceeding. In this regard, Complainants' Motion is a "Trojan Horse" that could have ramifications well beyond this case. Granting Complainants access to Defendants' revenue masking factors would almost certainly result in repeated requests by shippers for access to unmasked Costed Waybill Sample data in future proceedings. Breaching the security of the masked revenue data in this manner would inject tremendous uncertainty into the Board's process for developing and maintaining the Waybill Sample, and could undermine what has proven to be a useful resource to the Board, the rail industry and to other stakeholders.

III. POST-2005 PRICING DOCUMENTS

Complainants Request No. 6 seeks disclosure of any "offers," "bids," or "responses to requests for proposals" relating to the proposed transportation of coal by Defendants "in calendar year 2005 or beyond." Defendants objected to Request No. 6 on the grounds that the requested information is not relevant to any issue properly before the Board in this phasing proceeding, and because disclosure of information regarding Defendants' ongoing rate negotiations with other customers would be highly prejudicial to those negotiations, and to Defendants' ability to negotiate transportation contracts in the future. (Defendants have agreed to produce any transportation contracts that have actually been entered into during the period covered by Complainants' discovery requests.)

Complainants assert that information regarding Defendants' current negotiations with other coal shippers is relevant to "the magnitude of the increases to Duke and CP&L as compared to other shippers." Motion at 18. However, as Defendants have shown above, such rate comparisons are not relevant to the standards governing the phasing constraint, and the Board cannot properly base a phasing order on the existence of a "disparity" in the rates paid by Complainants as compared to those paid by other coal shippers (particularly those who ship coal pursuant to privately negotiated rail transportation contracts). Moreover, rates and service terms that are currently under discussion between Defendants and their customers, but which have not been agreed to, are at best speculative at this time, and could not form the basis for any (otherwise arguably) valid rate comparison. Such potential future rates and service terms have no relevance to the issues before the Board in this phasing proceeding.

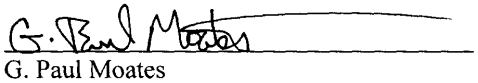
The Board (and the ICC before it) have consistently refused to require parties to reveal the substance of ongoing negotiations, or of privately-negotiated settlement agreements. *See, e.g.*, Finance Docket No. 31438, *Sandusky County-Seneca County-City of Tiffin Port Authority –*

Feeder Line Application – Consolidated Rail Corporation, 6 I.C.C. 2d 568 (1990); Finance Docket No. 30000, *Union Pacific Corp. et al – Control – Missouri Pacific Corp. et al.* 366. I.C.C. 462. 613 (1982) ("we are not concerned with whether terms that may have been proposed and negotiated, but which were not agreed to, would have been in the public interest"). Compelling Defendants to disclose the details of ongoing contract negotiations with other coal shippers would do nothing to advance the Board's analysis of the issues in this phasing proceeding. However, such disclosure would compromise Defendants' ability to complete agreements with such customers and could chill their ability to reach contractual agreements with shippers in the future. Complainants' Motion to compel production of documents relating to ongoing (but not completed) coal transportation contract negotiations should be denied.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Board deny Complainants' Motion in its entirety.

Respectfully submitted,



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Dated: March 21, 2005

CERTIFICATE OF SERVICE

I certify that, on this 21st day of March, 2005, I served the foregoing Defendants' Joint Reply in Opposition to Complainants' Joint Motion to Compel Discovery Responses on Phasing, by causing copies thereof to be delivered to:

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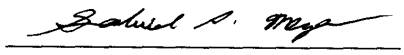

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